

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 3:24-cv-00026-MMD-CLB

Plaintiff,

ORDER

v.

STATE OF NEVADA, *et al.*,

Defendants.

I. SUMMARY

The United States brings this civil enforcement action against the State of Nevada and Nevada's Office of the Attorney General ("AG's Office") (collectively, "Nevada"), and the Public Employees' Retirement System of Nevada ("NVPERS"), alleging that Defendants violated the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301 *et seq.*, by overcharging certain state employees returning from military service for pension service credits known as "air time." (ECF No. 1 ("Complaint").) NVPERS and Nevada each move to dismiss the Complaint. (ECF Nos. 20 ("NVPERS' Motion")¹, 23 ("Nevada's Motion")².) The Court heard oral argument on the Motions. (ECF No. 42 ("Hearing").) For the reasons explained below, the Court finds that the United States fails to state a claim under USERRA and grants the Motions.

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¹The United States responded (ECF No. 31) and NVPERS replied (ECF No. 39).

²The United States responded (ECF No. 32) and Nevada replied (ECF No. 38).

1 **II. BACKGROUND³**

2 The United States Department of Justice (“DOJ”) brings this suit on behalf of
3 Nevada state employee Charles Lehman and “other similarly-situated [reemployed]
4 servicemembers.” (ECF No. 1 at 1-2, 11-13.) See 38 U.S.C. §§ 4322, 4323(a)(1) (giving
5 DOJ authority to bring a USERRA enforcement action against a state employer on
6 behalf of a person who has unsuccessfully sought resolution through the Department of
7 Labor complaint process).

8 Lehman became an attorney at the Nevada AG’s Office in August 2013 and is
9 also a commissioned officer in the Nevada National Guard. (ECF No. 1 at 3.) As a
10 public employee, Lehman is a qualified member of NVPERS, a tax-qualified defined
11 benefit pension plan which operates as an independent public agency to “provide
12 pension income to public employees in Nevada, including Nevada’s own state
13 employees.” (*Id.*) The AG’s Office is a participating NVPERS employer. (*Id.*) As set out
14 by Nevada statute, NVPERS allows plan members the option to purchase up to five
15 years of service time in future pension credits (commonly referred to as “air time”) after
16 attaining five years of creditable service as a public employee. See NRS § 286.300. By
17 statute, the cost to purchase air time credits is actuarially determined by the employee’s
18 age and rate of compensation at the time the employee purchases the credits. See *id.*
19 at § 286.3005.

20 During the period between May 15, 2017, and December 8, 2020, Lehman was
21 called to active duty with the National Guard, taking military leave from his civilian
22 position at the AG’s Office. (ECF No. 1 at 4.) In 2020, Lehman requested reemployment
23 under USERRA and resumed his work as an attorney at the AG’s Office. (*Id.*) USERRA
24 provides broad protections to returning servicemembers and specifically mandates that
25 a covered person “shall be treated as not having incurred a break in service with the
26 employer or employers maintaining [a pension] plan by reason of such person’s period

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28 ³The following facts are adapted from the Complaint.

1 or periods of service in the uniformed services.” 38 U.S.C. § 4318(a)(2)(A). Upon
2 reemployment, Lehman “immediately requested credit for his military service time,”
3 although the AG’s Office did not update Lehman’s personnel records to properly reflect
4 his active duty leave until April 2021. (ECF No. 1 at 4-5.) After receipt of Lehman’s
5 records in April 2021, “NVPERS recognized that for pension purposes he did not have a
6 break in service [under USERRA].” (*Id.* at 6.)

7 On April 26, 2021, shortly after his records were updated to credit his military
8 service, Lehman inquired about purchasing pension air time as an NVPERS member.
9 (*Id.*) Had he remained continuously employed at the AG’s Office, Lehman would have
10 passed the five-year tenure mark qualifying him to buy air time under NRS § 286.300 on
11 August 26, 2018. (*Id.*) But Lehman could not purchase air time in 2018, or for the
12 following two years, while he was away on military leave. (*Id.*) In response to Lehman’s
13 2021 inquiry, NVPERS recognized that Lehman was eligible to purchase air time,
14 counting his period of active duty toward the five-year threshold given his
15 reemployment. (*Id.*) NVPERS informed Lehman, however, that he would need to buy
16 any desired air time at the current April 2021 actuarial rate, calculated based on his age
17 and pay at that time—a total cost of \$139,391 for five years of air time credits. (*Id.*) If
18 Lehman had been able to purchase air time several years earlier, at the five-year mark
19 in 2018, the actuarial cost reflecting his younger age and lower salary would have been
20 \$101,184.40 – a difference of \$38,207. (*Id.* at 4, 10.) Lehman filed a USERRA complaint
21 with the Department of Labor (“DOL”) under 38 U.S.C. § 4322(a)(1), alleging that he
22 should have been offered the lower 2018 air time price. (ECF No. 1 at 6.) After the DOL
23 Veterans Employment and Training Service (“VETS”) investigated Lehman’s complaint
24 and failed to reach a resolution, VETS referred the matter to DOJ. (*Id.* at 7.)

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1 In the Complaint, DOJ alleges that Nevada and NVPERS violated USERRA by
 2 charging Lehman and other similarly-situated individuals⁴ an air time price which
 3 exceeded the amount returning service-members would have been permitted or
 4 required to pay had they remained continuously employed. (*Id.* at 8, 11.) The United
 5 States requests declaratory and injunctive relief as well as damages, asking the Court
 6 to declare that NVPERS' policy regarding the calculation of air time costs for
 7 servicemembers who pass their five-year tenure while on military leave is in violation of
 8 USERRA, to order Defendants to award Lehman and similarly-situated individuals air
 9 time pension credits at the lower rate, and to enjoin Nevada and NVPERS from their
 10 "practice of overcharging" returning servicemembers. (*Id.* at 12-13.)

11 **III. DISCUSSION**

12 Nevada and NVPERS each move to dismiss the Complaint for failure to state a
 13 claim under Federal Rule of Civil Procedure 12(b)(6). (ECF Nos. 20, 23.) The Court will
 14 address the Motions together because Defendants' central arguments overlap, and
 15 because the dispute rests primarily on a question of law: whether USERRA requires
 16 state employers to offer reemployed servicemembers the option to purchase air time at
 17 the lower actuarial rate which would have been available at their five-year tenure mark
 18 had they not taken military leave.⁵ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)

20 ⁴The United States includes specific allegations about a second attorney, Jeff
 21 Hoppe, who was hired by the AG's Office in 2011, later transferring to the Washoe
 22 County District Attorney's Office without a break in NVPERS covered service. (ECF No.
 23 1 at 7-8.) Hoppe served on active duty with the Army National Guard from January to
 24 December 2016, and would have passed his five-year tenure in July 2016. (*Id.*) The
 25 District Attorney's Office reemployed Hoppe under USERRA, but failed to initially
 26 recognize his military time. (*Id.*) Hoppe ultimately had to wait until April 2017 to
 27 purchase air time credits because of NVPERS' delay. (*Id.*)

28 ⁵Disposition of the Motions is not dependent on distinctions between NVPERS
 (as a pension plan) and Nevada (as a qualifying employer), and the Court does not
 address NVPERS' arguments to the extent they evaluate this distinction under
 USERRA. In addition, the Court does not address the implications of Defendants'
 alleged delays in properly crediting Lehman and Hoppe's military time *after*
 reemployment, given the United States' contentions in its responsive filings. Defendants
 argue in their Motions that any delays in crediting military service were minimal, did not
 constitute separate violations of USERRA, and did not ultimately alter the air time price

1 (holding that while a district court must accept as true all well-pled factual allegations in
 2 a complaint, legal conclusions are not entitled to the assumption of truth); *Balistreri v.*
 3 *Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990) (dismissal is proper under Rule
 4 12(b)(6) when a complaint exhibits the “lack of a cognizable legal theory”).

5 Defendants argue that NVPERS appropriately credited Lehman’s 3.5 years of
 6 military service by allowing him to purchase air time—a wholly elective pension
 7 benefit—at the 2021 rate. (ECF Nos. 20 at 2, 23 at 2-7.) They contend that the United
 8 States’ Complaint puts forward an unsupported and novel interpretation of USERRA’s
 9 provision on pension benefits, 38 U.S.C. § 4318, which would require public employers
 10 to offer returning service members an unfairly discounted rate not available to other
 11 Nevada employees. (*Id.*) In opposition, the United States argues that USERRA’s
 12 protections must be interpreted broadly to cover air time, that USERRA trumps contrary
 13 state law, and that treating a servicemember “as if” they had been continuously
 14 employed mandates a retroactive rate. (ECF Nos. 31, 32.)

15 The Court first examines USERRA’s overarching structure according to principals
 16 of statutory construction and then turns to Section 4318, the provision primarily cited by
 17 the United States. See *Deutsche Bank Nat’l Trust Co. v. Old Republic Title Ins. Grp.,*
 18 *Inc.*, 532 F. Supp. 3d 1004, 1011 (D. Nev. 2021). While USERRA protections extend to
 19 a broad range of reemployment rights and benefits, the statute makes important
 20 distinctions between categories of covered rights and benefits. The Court finds that
 21 while the vested *right* to purchase pension air time is protected under USERRA, air time
 22 credits themselves are not protected under Section 4318. Accordingly, the Court grants
 23 Defendants’ Motions and dismisses the Complaint.

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25 available to Lehman. (ECF No. 20 at 11-12.) In response, the United States concedes
 26 that while Defendants’ delays caused prejudice, the delays are not alleged as a
 27 separate violation of USERRA—the Complaint centers on Defendants’ failure to offer
 28 the actuarial rate available at the five-year tenure mark. (ECF No. 31 at 15.) Thus,
 because the United States does not appear to assert that a separate or additional legal
 basis for relief exists as to the post-reemployment delays, the Court will not consider the
 related arguments in this order.

1 **A. Structure of USERRA**

2 Enacted in 1994, USERRA is a non-discrimination statute designed to encourage
 3 noncareer military service and to minimize its disadvantages and disruption to
 4 servicemembers returning to civilian life. *See* 38 U.S.C. § 4301(a) (setting out the
 5 purposes of USERRA, which include to “encourage noncareer service in the uniformed
 6 services,” to “minimize the disruption to the lives of persons performing service . . . as
 7 well as to their employers, their fellow employees, and their communities, by providing
 8 for . . . prompt reemployment” and to “prohibit discrimination” against persons serving in
 9 the military).

10 USERRA imposes obligations on public and private employers of returning
 11 servicemembers as to a range of reemployment rights and benefits, “contain[ing] ‘the
 12 most expansive protection to servicemembers yet enacted.’” *Clarkson v. Alaska
 13 Airlines, Inc.*, 59 F.4th 424, 429 (9th Cir. 2023) (quoting *Travers v. Fed. Express Corp.*,
 14 8 F.4th 198, 201 (3d Cir. 2021)). Federal reemployment rights are “to be liberally
 15 construed for the benefit of those who left private life to serve their country.” *Ziobor v.
 16 BLB Res., Inc.*, 839 F.3d 814, 819 (9th Cir. 2016) (quoting *Fishgold v. Sullivan Drydock
 17 & Repair Corp.*, 328 U.S. 275, 285 (1946)). Indeed, USERRA’s definition of “benefit,”
 18 “benefit of employment,” or “rights and benefits” is notably broad: Benefits include “the
 19 terms, conditions, or privileges of employment, including any advantage, profit,
 20 privilege, gain, status, account, or interest (including wages or salary for work
 21 performed) that accrues by reason of an employment contract or agreement or an
 22 employer policy, plan, or practice.” 38 U.S.C. § 4303(2). This definition expressly
 23 encompasses “rights and benefits under a pension plan,” among other kinds of
 24 employment advantages. *See id.* (providing additional examples, including advantages
 25 arising in relation to, *inter alia*, “a health plan . . . insurance coverage and awards,
 26 bonuses, severance pay, supplemental unemployment benefits, vacations, and the
 27 opportunity to select work hours”). *See also Scanlan v. Am. Airlines Grp., Inc.*, 384 F.
 28 Supp. 3d 520, 526 (E.D. Pa. 2019) (noting that USERRA’s introductory definition of

1 rights and benefits is expansive and the examples in Section 4303(2) are illustrative but
 2 not exhaustive).

3 USERRA “supersedes any State law” or any “contract, agreement, policy, plan,
 4 practice or other matter that reduces, limits, or eliminates in any matter any right or
 5 benefit provided [by the federal statute].” 38 U.S.C. § 4302(b). See *Wriggelsworth v.*
 6 *Brumbaugh*, 129 F. Supp. 2d 1106, 1112 (W.D. Mich. 2001) (“Congress intended a
 7 *uniform* set of protections available to returning veterans in the several states and
 8 expressly forbade modification of these protections by . . . state law.”) (emphasis in
 9 original). USERRA does not, however, supersede any state law or policy “that
 10 establishes a right or benefit that is more beneficial to, or is in addition to, a right or
 11 benefit provided for such person in this chapter.” 38 U.S.C. § 4302(a).

12 While USERRA must be liberally construed, the statute does not impose the
 13 same obligations on employers across all categories of covered benefits. Section 4316,
 14 which outlines USERRA’s general structure of rights, benefits, and obligations,
 15 distinguishes between *seniority-based* benefits—providing that entitlement is
 16 determined by the seniority a reemployed person had when they commenced military
 17 service plus additional seniority they “would have attained . . . had [they] remained
 18 continuously employed,” 38 U.S.C. § 4316(a)—and *non-seniority-based* benefits—
 19 where entitlement depends instead on whether such benefits are “generally provided by
 20 the employer . . . to employees having similar seniority, status, and pay who are on
 21 furlough or leave of absence,” *id.* at § 4316(b)(1)(B). And as particularly relevant to the
 22 instant action, Section 4316(b)(6) separately provides that “[t]he entitlement of a person
 23 to a right or benefit under an employee pension benefit plan is provided for under
 24 section 4318.” *Id.* at § 4316(b)(6).

25 Because an analysis of appropriate USERRA protections varies based on the
 26 classification of the right or benefit at issue, the Court must be precise in evaluating air
 27 time within the categories of covered benefits, while also bearing in mind the statute’s
 28 breadth. Nevada law provides that after five years of service, a current Nevada public

1 employee who is a member of NVPERS becomes eligible to purchase up to five years
2 of additional pension air time service credit at the actuarial rate. See NRS § 286.300(2)
3 (“[An NVPERS member] who has 5 years of creditable service may . . . purchase up to
4 5 years of [additional] service . . . [t]he member must pay the full actuarial cost of the
5 service as determined by an actuary of [NVPERS].”); *id.* at § 286.300(5) (“A person who
6 becomes a member of the System for the first time on or after January 1, 2000, may . . .
7 purchase creditable service pursuant to subsection [2] . . . only if, at the time of the
8 purchase, the person is employed by a participating public employer in a position
9 eligible for membership in the System.”); *id.* at § 286.017 (defining “actuarial
10 computation” as “the computation based on benefits earned and life expectancy of
11 member and beneficiary to determine necessary reduction of benefits under retirement
12 options or to determine cost of purchasing additional benefits as provided in this
13 chapter”). After passing the initial five-year threshold, an employee’s decision to
14 purchase air time at the actuarial rate is discretionary, and does not depend on years in
15 service. See *id.* at § 286.300. This distinguishes air time from NVPERS members’
16 separate statutory right to purchase “all previous *creditable service* performed with the
17 member’s present employing agency if that service was performed before the
18 enrollment of the member’s agency in the System.” *Id.* at § 286.300(1) (emphasis
19 added).

20 Notably, Lehman’s earlier DOL complaint process demonstrates agency
21 uncertainty about whether air time is properly classified as a pension benefit under
22 Section 4318, a seniority benefit, or a non-seniority benefit for purposes of applying
23 USERRA. Neither USERRA itself nor DOL rules contain guidance specific to air time,
24 and VETS cited to multiple separate regulations, concluding that “NVPERS’ denial of
25 Mr. Lehman’s right to purchase air time at a rate he would have incurred in August 2018
26 is a protected right under USERRA as a seniority benefit (20 C.F.R. §§1002.210-213), a
27 non-seniority benefit (1002.149-150), and/or a pension benefit (1002.262).” (ECF No.
28 20-2 at 2.) See also Uniformed Services Employment and Reemployment Rights Act of

1 1994, as amended, 70 Fed. Reg. 75,246, 75,285 (Dec. 19, 2005) (“DOL Final Rule”)
 2 (noting that USERRA covers only “certain aspects of the reemployed service member’s
 3 pension plan rights” and where USERRA does not “provid[e] specific guidance . . . State
 4 laws governing the establishment and operation of pension plans . . . continue to apply
 5 in the context of providing benefits under USERRA”). However, in the Complaint, as
 6 well as in response to Defendants’ Motions and at the Hearing, the United States bases
 7 its claims primarily on Section 4318, arguing that air time is protected under that
 8 Section’s specific requirements for pensions, without suggesting that seniority or non-
 9 seniority benefit protections provided elsewhere in USERRA might apply separately or
 10 in addition. (ECF Nos. 1, 31, 32, 42.) The Court thus focuses its review on the scope of
 11 Section 4318.

12 **B. Section 4318**

13 The Court finds that air time is not an accrued pension benefit earned for service
 14 within the meaning of Section 4318 of USERRA. The Court further finds that even if air
 15 time falls within the scope of Section 4318, Defendants did not violate the restrictions
 16 therein because they did not require a contribution which “exceed[s] the amount
 17 [Lehman and similarly-situated individuals] would have been permitted or required to
 18 contribute had [they] remained continuously employed.” 38 U.S.C. § 4318(b)(2).

19 Section 4318 covers reemployment rights arising under employee pension
 20 benefit plans, including “right[s] provided under any Federal or State law governing
 21 pension benefits for governmental employees.” *Id.* at § 4318(a)(1)(A). The Section
 22 provides that “[a] person reemployed” after military service “shall be *treated as not*
 23 *having incurred a break in service* with the employer or employers maintaining the
 24 [pension] plan by reason of such person’s period or periods of service in the uniformed
 25 services.” *Id.* at § 4318(a)(2)(A) (emphasis added). “[U]pon reemployment,” a period of
 26 military service “shall . . . be deemed to constitute service with the employer . . . for the
 27 purpose of determining the nonforfeitality of the person’s accrued benefits and *for the*
 28 *purpose of determining the accrual of benefits under the plan.*” *Id.* at § 4318(a)(2)(B)

1 (emphasis added). Section 4318(b)(2) further provides that, when accrued benefits are
 2 “contingent on the making of, or derived from, employee contributions or elective
 3 deferrals,” a reemployed individual must make such contributions or deferrals to receive
 4 benefits, but “[n]o such payment may exceed the amount the person would have been
 5 permitted or required to contribute had the person remained continuously employed by
 6 the employer throughout the period of service described in subsection (a)(2)(B).” *Id.* at §
 7 4318(b)(2).

8 The United States asserts that air time is covered under Section 4318(b)(2) as a
 9 statutory pension right “contingent on the making of . . . employee contributions,” and
 10 that Defendants thus overcharged Lehman by requiring him to pay the 2021 price
 11 because that price “exceed[s] the amount [he] would have been permitted or required to
 12 contribute had [he] remained continuously employed.” (ECF Nos. 1 at 8, 11, 31, 32.)
 13 Lehman should be permitted, the United States argues, to pay the 2018 actuarial price.
 14 (*Id.*) But Section 4318 does not apply to mandate the government’s outcome.

15 To start, as NVPERS emphasizes in its Motion, Section 4318(b) applies to
 16 benefits which *accrue* in relation to a pension plan. (ECF No. 20 at 7-8.) While “accrued
 17 benefit” is not directly defined in USERRA, the plain meaning of the term—and its
 18 meaning in context—implies accumulation over time. As a baseline, it is helpful to
 19 consider how most core types of pension benefit accrue: employers and/or employees
 20 contribute to a pension plan over years of service, and employees are later entitled to a
 21 benefit in the form of payments after retirement—a benefit which has accumulated over
 22 time, often according to a vesting schedule. This kind of foundational pension benefit is
 23 “proportional to service,” accrues with relative predictability over time, and may also be
 24 characterized as a form of deferred compensation. See *Cal Fire Loc. 2881 v. California*
 25 *Pub. Employees’ Ret. Sys.*, 435 P.3d 433, 448-49 (Cal. 2019)⁶ (“Pension benefits, the

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27 ⁶Nevada’s Motion includes an extensive discussion of the “California Rule” of
 28 pensions, citing to the California Supreme Court’s decision in *Cal Fire*. (ECF No. 23 at
 10-11.) Nevada argues that under the California Rule, air time should be treated as a

1 classic example of deferred compensation, flow directly from a public employee's
 2 service, and their magnitude is roughly proportional to the time of that service. Just as
 3 each month of public service earn an employee a month's cash compensation, it also
 4 earns him or her a slightly greater benefit upon retirement."). Cf. 29 U.S.C. § 1002(23)
 5 (defining an "accrued benefit" under the Employee Retirement Income Security Act as
 6 "the individual's accrued benefit determined under the plan . . . expressed in the form of
 7 an annual benefit commencing at normal retirement age").

8 Air time does not accrue as core pension benefits do. Although an employee may
 9 only purchase air time after five years of service, the decision to make the purchase
 10 after that point is wholly discretionary. See NRS § 286.300. The air time an employee
 11 elects to buy to supplement their pension does not function like compensation, nor does
 12 it predictably accrue over time "by dint of time-in-service," as DOJ argues. (ECF No. 31
 13 at 11.) See *Cal Fire*, 435 P.3d at 448-49 ("[An] eligible employee's service was entirely
 14 irrelevant to his or her exercise of the opportunity [to purchase additional service time
 15 credits] . . . [o]nce the five-year qualification period was served, further public
 16 employment did not increase the amount of ARS credit that an employee could
 17 purchase or in any other way affect his or her opportunity."). Air time is thus "untethered
 18 to actual service." *Cal Fire*, 435 P.3d at 439. See also *State of California v. United*
 19 *States Dep't of Lab.*, 306 F. Supp. 3d 1180, 1183 (E.D. Cal. 2018) ("Airtime is a time
 20 credit that adds fictitious years to the true years an employee has worked before retiring
 21 . . ."); Cf. *Moss v. United Airlines, Inc.*, 20 F.4th 375, 383-84 (7th Cir. 2021) (quoting
 22 *Ala. Power Co. v. Davis*, 431 U.S. 581, 588-89 (1977)) (analyzing whether employee
 23 sick time would have "accrued, with reasonable certainty, had the veteran been
 24 continuously employed" to determine whether sick time should be classified as a

25 "wholly optional fringe benefit" with no protection under USERRA. (*Id.*) *Cal Fire* primarily
 26 addresses the distinct question of whether California's air-time equivalent is a
 27 contractual or statutory right, and the case does not directly apply to the facts in the
 28 instant action. The Court thus finds Nevada's argument that the California Rule entirely
 removes air time from USERRA's purview unpersuasive. However, the Court considers
 the *Cal Fire* decision to the extent it provides relevant discussion of the nature of air
 time compared to other kinds of pension benefits. See 435 P.3d at 448-49.

1 seniority-based benefit). In fact, unlike most “advantages of employment,” which
 2 increase with years of service and age, air time becomes increasingly expensive with
 3 age, as the actuarial rate accounts for an employee’s proximity to retirement and
 4 compensation. See 38 U.S.C. § 4303(2) (defining USERRA-covered benefits as an
 5 “advantage,” “gain,” “status,” etc.) And while Section 4318 requires that employers treat
 6 reemployed individuals as having not incurred a break in service for pension purposes,
 7 see 38 U.S.C. § 4318(a)(2)(A), an employee in Lehman’s place who had not taken a
 8 break in service might with equal or greater likelihood never have elected to purchase
 9 air time during that identified time period—or they might have purchased air time at the
 10 December 2018 rate, or the August 2019 rate, or at any other time.⁷

11 The distinction between the right to purchase air time pension credits and the
 12 pension credits themselves is important here. The United States acknowledges as
 13 much, arguing in response to NVPERS’ motion that “[e]ven if the pension credits
 14 themselves are ‘untethered to actual service,’ the right to purchase credits assuredly is”
 15 (ECF No. 31 at 12), but a closer analysis of this distinction ultimately demonstrates the
 16 flaws in DOJ’s reasoning. The *right* to purchase air time may functionally vest after five
 17 years—and in this general sense, the right might indeed be said to accrue. But
 18 *substantive* air time credits to an individual pension do not accrue at the five-year mark,
 19 nor at any other time, because such credits continue to depend on an affirmative act of
 20 discretion by an employee who does not obtain any price advantage through further

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23 ⁷Differentiating between accrued and unaccrued benefits is important in practice.
 24 When a servicemember returns to civilian employment, calculation of accrued pension
 25 benefits covered under Section 4318 generally involves limited assumptions about the
 26 discretion on the part of employer or employee; the employer may be required to
 27 estimate the compensation the employee would have received during their military
 28 leave. Considering air time and the facts of this case, by contrast, there is no clear
 reason why the 2018 rate is more appropriate than any other rate a continuously-
 employed individual could have selected during the relevant period.

1 years of employment.⁸ Notably, courts regularly consider distinctions between accrual
 2 rates and accruals themselves in analyzing other kinds of benefits under USERRA. For
 3 example, a servicemember may be entitled to an increased rate of vacation-time
 4 accrual upon reemployment, but that does not necessarily mean they return to a bank of
 5 days off.⁹

6 Here, Defendants treated Lehman as eligible to purchase air time, counting his
 7 military service towards his five-year threshold upon reemployment. See 38 U.S.C. §
 8 4318(a)(2)(B) (time “served by a person in the uniformed services shall . . . constitute
 9 service . . . for the purpose of determining the accrual of benefits under the plan”). By
 10 doing so, Defendants appropriately recognized that Lehman’s *right* to purchase air time
 11 had vested or accrued. Defendants were not required to go further by freezing time part
 12 way through Lehman’s service at the lower August 2018 rate, because only the right to
 13 purchase air time—not the substantive air time credits themselves—had accrued at

15 ⁸Another way to view this issue is to consider the increasing *rate* to purchase air
 16 time under an accrual analysis. Because the actuarial rate increases with age, an
 17 employee could more accurately be described as accruing a *detriment* in the form of a
 18 higher rate over time, rather than as accruing a benefit or advantage of employment.
 Viewed this way, the United States essentially argues against accrual of the actuarial
 rate for reemployed servicemembers.

19 ⁹Although the Court does not analyze air time as a seniority- or non-seniority
 20 based benefit in this order, courts’ treatment of vacation time and sick leave within the
 21 seniority- and non-seniority language of USERRA provides a useful parallel. For
 22 example, while the rate of accrual of vacation days is generally considered an accrued
 23 “perquisite of seniority,” vacation time itself is generally considered a non-seniority-
 24 based benefit: it is a form of short-term compensation rather than a reward for length of
 25 service, and there is a lack of reasonable certainty as to whether the employee would
 26 have attained the benefit. See, e.g., *Sorenson v. Delta Air Lines, Inc.*, 667 F. Supp. 3d
 27 1289, 1312-14 (N.D. Ga. 2023), reconsideration denied sub nom. *Smith v. Delta Air
 Lines, Inc.*, Case No. 1:17-CV-00541-ELR, 2023 WL 5420250 (N.D. Ga. July 24, 2023),
 and appeal dismissed, Case No. 23-12698, 2024 WL 36572 (11th Cir. Jan. 3, 2024).
 See also *Foster v. Dravo Corp.*, 420 U.S. 92 (1975). The analysis of vacation day
 accruals thus depends on whether the employer offers the benefit to individuals on
 other kinds of leave, because “USERRA entitled employees on [military leave] to the
 same non-seniority-based benefits afforded to ‘employees having similar seniority,
 status, and pay who are on furlough or leave[.]’” *Sorenson*, 667 F. Supp. 3d at 1312-14
 (citing 38 U.S.C. § 4316(b)(1)(B)). See also 20 C.F.R. § 1002.150(c) (“As a general
 matter, accrual of vacation leave is considered to be a non-seniority benefit that must be
 provided by an employer to an employee on a [MLOA] only if the employer provides that
 benefit to similarly situated employees on comparable leaves of absence.”).

1 reemployment. USERRA does not impose a fictitious assumption that a
 2 servicemembers would use their discretion at the exact moment when they become
 3 eligible to do so.

4 The Court further finds that even if air time qualifies as an accrued benefit, the
 5 United States' arguments still fall short. DOJ asserts that air time is a benefit contingent
 6 upon employee contributions under Section 4318(b)(2), and that USERRA thus
 7 provides servicemembers a period of time after reemployment to make up their
 8 contribution at the retroactive rate. See *id.* at § 4318(b)(2) (providing that a reemployed
 9 person must make up their contributions over a payment period which begins at
 10 reemployment, the duration of which "is three times the period of the person's service in
 11 the uniformed services . . . not to exceed five years"). Section 4318(b)(2) prohibits
 12 employers from imposing a contribution payment which "exceed[s] the amount the
 13 person would have been permitted or required to contribute had [they] remained
 14 continuously employed." *Id.* But here, assuming that a one-time purchase of air time is a
 15 "contribution" within the meaning of subsection (b)(2)¹⁰, Defendants did not charge an
 16 amount that exceeds the permitted or required contribution. Importantly, while USERRA
 17 requires treating servicemembers as if they had been continuously employed for
 18 pension purposes, USERRA rights nevertheless vest "upon reemployment." *Id.* at §

20 ¹⁰The Court notes that provisions of Section 4318(b) describing employer and
 21 employee contributions clearly interact with definitions and distinctions in the Internal
 22 Revenue Code, and the parties do not address if and how a one-time purchase of air
 23 time qualifies as a "contribution" within the meaning of the statute. See, e.g., 38 U.S.C.
 24 § 4318(b)(2) (citing to the definition of elective deferrals in the Internal Revenue Code);
 25 26 U.S.C. § 414(u) (providing, as part of the Internal Revenue Code, certain "special
 26 rules relating to veteran's reemployment rights under USERRA," including that certain
 27 retroactive adjustments are not required, and that no provision of USERRA shall be
 28 construed as requiring "any crediting of earnings to an employee with respect to any
 contribution before such contribution is actually made"); *id.* at § 414(i) ("A defined
 contribution plan [is a] plan which provides for an individual account for each participant
 and for benefits based solely on the amount contributed to the participant's account.");
id. at § 414(j) ("A defined benefit plan [is] any plan which is not a defined contribution
 plan."). See also Contribution Rates, NVPERS, <https://www.nvpers.org/employers/contribution-rates> (providing that the contribution rate
 for regular members of employer paid plans is "33.50% Shared equally between
 employer and employee" and for employee/employer paid plans is 17.5%).

1 4318(a)(2)(B). See also, e.g., 20 C.F.R. § 1002.262 (employers not required to make
 2 pension contributions until a service member employee returns to work). Lehman was
 3 reemployed in 2020. Had Lehman remained at the AG's Office continuously until 2020,
 4 the maximum permissible contribution Defendants could have imposed for air time in
 5 2020 would be the actuarially-calculated price at that time—the price Lehman was in
 6 fact offered (without considering Defendants' additional delays). Because Defendants
 7 did not exceed that price, they did not violate Section 4318(b)(2).

8 DOJ also points to Section 4318(b)(3)(A), which provides that “[f]or purposes of
 9 computing . . . the employee's contributions . . . the employee's *compensation* during
 10 the period of service . . . shall be computed . . . at the rate the employee would have
 11 received but for the period of service” (emphasis added). But subsection (b)(3) relates
 12 to the computation of past compensation as necessary to *calculate benefits which have*
 13 *accrued* at the moment of reemployment. See *id.* It does not require, as DOJ contends,
 14 that employers offer returning servicemembers a past actuarial rate to make the
 15 discretionary purchase of an unaccrued benefit, especially because a past actuarial rate
 16 is based not just on compensation but also the servicemember's younger *age*.

17 In sum, Defendants were obligated under USERRA to treat Lehman like any
 18 other 2020 employee who had remained continuously employed until that time—
 19 Defendants were not obligated to treat him like a 2018 employee. As Defendants
 20 emphasize, to do so would create a protection not available to any other Nevada
 21 employees, effectively giving returning servicemembers a set rate which does not
 22 accurately reflect the time value of money or advancing age and increasing
 23 compensation, elements of the actuarial rate carefully calibrated to preserve the
 24 integrity of the retirement system. See *O'Hara v. State ex rel. Pub. Emps. Ret. Bd.*, 764
 25 P.2d 489, 490 (Nev. 1988) (“The retirement program is based upon actuarial principles
 26 and its rules must be strictly enforced to ensure that funds will be available in the
 27 future.”).

28

1 Finally, the United States' assertions about the general nature of USERRA do not
2 undermine the analysis above. DOJ emphasizes that "USERRA's benefits are broad,
3 preempt State law or policy to the contrary, and must be broadly construed." (ECF No.
4 31 at 5-6.) But as the Court has already noted, USERRA is fundamentally an anti-
5 discrimination statute: its breadth and preemption power do not allow—let alone
6 require—the Court to interpret the statute's reach to extend beyond its plain language.
7 *See, e.g., McCarrin v. Pollera*, Case No. CV 17-1691, 2019 WL 4857464, at *6 (E.D.
8 Pa. Sept. 30, 2019) ("USERRA affords a veteran no 'extra' benefits for having served in
9 the military; s/he gets only what s/he would have gotten had s/he remained on the job,
10 rather than serving"); 38 U.S.C. § 4302(a); *Foster v. Washoe County*, 3:18-cv-00438-
11 MMD-CBC, ECF No. 17 at 5 n.3, 2019 WL 13470571 at *3, n.3 (D. Nev. October 31,
12 2019) (unpublished) ("Extending protections under a federal statute is within the purview
13 of Congress—not this Court.").

14 Accordingly, the Court concludes that air time credits are not protected under
15 Section 4318 of USERRA. The Court grants Defendants' Motions on that basis and
16 dismisses the Complaint for failure to state a claim under Rule 12(b)(6).

17 **IV. CONCLUSION**

18 The Court notes that the parties made several arguments and cited to several
19 cases not discussed above. The Court has reviewed these arguments and cases and
20 determines that they do not warrant discussion as they do not affect the outcome of the
21 Motions before the Court.

22 It is therefore ordered that the Public Employees' Retirement System of Nevada's
23 motion to dismiss (ECF No. 20) is granted.

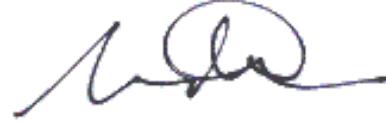
24 It is further ordered that the State of Nevada and Office of the Attorney General's
25 motion to dismiss (ECF No. 23) is granted.

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1 It is further ordered that the United States' Complaint (ECF No. 1) is dismissed.
2 The Clerk of Court is directed to enter judgment accordingly and close this case.
3 DATED THIS 16th Day of December 2024.

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6 MIRANDA M. DU
7 UNITED STATES DISTRICT JUDGE
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